No.

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1991

William E. Schrambling
Accountancy Corporation
and
Harold E. Allen
Petitioners,

vs.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David M. Kirsch
Four North Second Street
Suite 825
San Jose, CA 95113
Telephone: (408) 286-9700
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether tax return information remains confidential, within the meaning of Title 26, U.S.C. §6103, notwithstanding that it has been lawfully disclosed in notices of federal tax lien recorded in the public record or in a bankruptcy petition filed by a taxpayer.

LIST OF PARTIES

The parties to the instant proceedings are William E. Schrambling Accountancy Corporation and Harold E. Allen, petitioners, and the United States of America, respondent. There were two (2) separate District Court proceedings, which were consolidated by the Ninth Circuit Court of Appeals for decision. The parties at the District Court for each action included the following:

William E. Schrambling Accountancy Corp. v. United States of America, N.D. Cal. CV 86-6483 AJZ (1988)

Plaintiff: William E. Schrambling Accountancy Corp.

Defendant: United States of America

Harold E. Allen v. United States of America, N.D. Cal. 89-20250-RPA (1990)

Plaintiff: Harold E. Allen

Defendant: United States of America

There are no other known parties in interest

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. *The Split Among the Circuit Courts of Appeals Presents an Important Unresolved Question* 6

II. *The Rule Enunciated by the Ninth Circuit Defeats the Purpose of the Statute Because it Permits the IRS to Disclose Information in Which Taxpayers Retain a Legitimate Expectation of Confidentiality.* 11

III. *A DISCLOSURE WHICH DOES NOT SERVE A LEGITIMATE GOVERNMENTAL PURPOSE OR WHICH IS NOT MADE IN RELIANCE ON A PRIOR LAW-*

FUL DISCLOSURE VIOLATES §6103 EVEN IF THE RETURN INFORMATION DISCLOSED HAS BEEN LAWFULLY DISCLOSED AND IS NO LONGER CONFIDENTIAL. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Federal Statutes:

26 U.S.C. [Internal Revenue Code]

§6103 ..... 7-9, 13-18

§7431 ..... 4, 18

Other Federal Statutes:

5 U.S.C. §552(b)(7)(C) 11

Cases:

Husby v. United States, 672 F.Supp. 442 (N.D. Cal. 1987) 9

Johnson v. Sawyer, 640 F.Supp. 1126 (S.D. Tex. 1986) 8

Malis v. United States, 59 AFTR 2d 87-988 (C.D. Cal. 1986) 9

Rogers v. Hyatt, 697 F.2d 899 (10th Cir. 1983) 7, 9

Stokwitz v. United States, 831 F.2d 893 (9th Cir. 1987) 15, 16

Thomas v. United States, 671 F.Supp. 15 (E.D. Wis. 1987) 10, 15, 16, 19

United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989) 11, 12, 14, 16, 18

Miscellaneous:

122 Cong. Rec. 24013 (1976) 14

Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 Law & Contemp. Prob. 342, 343-44 (1966) 13

Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt.1, p. 18 (Sept. 26-27, 1974) 12

S. Rep. No. 938, 94th Cong., 2nd Sess. 318, reprinted in 1976 Code Cong. & Admin. News 3747 13

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

William E. Schrambling
Accountancy Corporation,
Petitioner,

vs.

United States of America,
Respondent.

Harold E. Allen,
Petitioner,

vs.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectively pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 5, 1991. (Appendix A hereto)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ___ F.2d ___. It is reprinted beginning at page 1 in *Appendix A* to this petition. The opinions of the District Court for the Northern District of California may be found as follows: *William E. Schrambling Accountancy Corporation v. United States*, 689 F.Supp. 1001, 61 AFTR 2d 88-1055 (N.D. Cal. 1988) - *Appendix B* hereto.

Harold E. Allen v United States, an unreported case, (N.D. Cal. January 3, 1990) - *Appendix C* hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was filed July 5, 1991. This Court has jurisdiction to review the judgements and opinions of the Court of Appeals pursuant to 28 U.S.C. §§1254(1) and 2101(c).

STATUTES INVOLVED

Title 26, U.S.C. §6103

26 U.S.C. §6103(a) provides, in pertinent part:

> (a) Returns and return information shall be confidential, and except as authorized by this title -
>
> > (1) no officer or employee of the United States, * * * shall disclose any return or return information obtained by him in any manner in

connection with his service as such officer or an employee or otherwise under the provisions of this section.

STATEMENT OF THE CASE

These cases involve levies issued by the Internal Revenue Service to collect taxes due from the petitioners.[1] Believing that the levies were not issued in compliance with the statutory provisions authorizing such action (see 26 U.S.C. §§6331, et seq), the petitioners filed their respective actions in District Court pursuant to 26 U.S.C. §7431. Petitioners argued that because the levies were not properly issued the disclosures contained therein violated §6013(a). The government argued, inter alia, that the levies were properly issued and that in any event their issuance did not violate §6103 because prior to the levies there had been lawful disclosure, on the pu-

[1]However, one of the levies issued with respect to Harold E. Allen was issued after the tax liability sought to be collected had been discharged by Mr. Allen's personal bankruptcy, and after the IRS, through its counsel, had acknowledged such discharge.

blic record, of certain information, so-called "return information." See 26 U.S.C. §6103(b)(2). In the case of William E. Schrambling Accountancy Corporation ("Schrambling") the lawful disclosures were in the form of notices of federal tax lien which had been properly filed before the levies issued. In the case of Harold E. Allen the prior disclosures occurred in filed notices of tax lien as well as in Mr. Allen's bankruptcy petition.

The District Courts found that the levies were not issued in compliance with the pertinent statutory provisions, that their issuance constituted violated §6013, and granted judgement for the petitioners.

The Ninth Circuit reversed the District Courts, holding that once return information is lawfully disclosed on the public record, whether such public record be recorded notices of tax lien or papers filed in (public) judicial

proceedings, that information is no longer "confidential and may be disclosed again without regard to section 6103." The Ninth Circuit reasoned that "[t]he relevant inquiry should focus on whether the prior authorized disclosure * * * destroys the confidential nature of the information."

Due to this disposition, the Ninth Circuit did not reach the question whether the levies issued in violation of the governing statutory provisions constitute unlawful disclosures of the information contained therein.

REASONS FOR GRANTING THE WRIT

I. *The Split Among the Circuit Courts of Appeals Presents an Important Unresolved Question*

As of this date, there appears to be a split among the circuit courts with respect to whether "confidentiality" is an issue in interpreting Section §6103 so that, if the return information is contained in the public records, a disclosure of such return information by a government employee would not be a violation of Section 6103.

In *Rogers v. Hyatt,* 697 F.2d 899 (10th Cir. 1983), an I.R.S. agent disclosed certain return information which had been the subject of court testimony, and therefore contained in the "public record." The Tenth Circuit held that "(e)ven assuming the loss of confidentiality in the content of the statements, the (later) disclosure was clearly unauthorized." Id. at 906. The fact that the taxpayer caused the information to be part of public record was of no concern in that Section 6103 did not authorize the disclosure of any return information, even if it was a part of a public record, except as specifically

authorized by statute. The court held the issue of the "loss of confidentiality" need not be even reached so that any disclosure (unless specifically authorized by statute) would violate Section 6103. Id. at 904, 906.

The Ninth Circuit held otherwise, stating that once return information is lawfully disclosed, whether by filed notices of tax lien or disclosure in court proceedings, it is not longer "confidential" and for that reason it is not entitled to any further protection under §6103.

The district courts are also divided. In *Johnson v. Sawyer,* 640 F.Supp. 1126 (S.D. Tex. 1986), the I.R.S. issued a press release containing return information of a taxpayer regarding his criminal prosecution. The Court held that, "Congress made the language of Sec. 6103 quite clear; any disclosure of return information is illegal 'except as authorized...'" Id. at 1132. Since the lan-

guage used by Congress was clear and there was no exception in the statute, it was found that these disclosures violated Section 6103.

In *Malis v. United States,* 59 AFTR 2d 87-988 (C.D. Cal. 1986), the district court held the United States liable for return information which was disclosed and which was already contained in Court files, citing *Rogers v. Hyatt,* supra, for the proposition that disclosure of return information that has been made public does not preclude liability for later unauthorized disclosure of the identical return information by government employees.

In *Husby v. United States,* 672 F.Supp. 442 (N.D. Cal. 1987), the district court noted the fact that return information may not be disclosed notwithstanding the fact that it is public record, also relying on *Rogers v. Hyatt,* supra. Id. at 444, n.1.

In *Thomas v. United States,* 671 F.Supp. 15 (E.D. Wis. 1987), the district court arrived at an opposite result, concluding that a press release issued by the United States summarizing a tax court proceeding is not an unauthorized disclosure.

In addition to the above, although the following is not a matter of record in these cases, counsel for petitioners has been informally advised by several government attorneys that there are a significant number of cases throughout the country, at various administrative and judicial stages, which have been placed in suspense pending the final resolution of this case.

With the courts clearly divided, and considering the number of taxpayers whose rights and remedies with respect to the tax laws may be effected, this Court should grant the writ to resolve this important conflict.

II. *The Rule Enunciated by the Ninth Circuit Defeats the Purpose of the Statute Because it Permits the IRS to Disclose Information in Which Taxpayers Retain a Legitimate Expectation of Confidentiality.*

The Ninth Circuit has equated the term "confidential" with secret. However, this Court has held that the mere appearance of information in the public domain does not eliminate all expectations of privacy in that information. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). In that case FBI "rap sheets" were found to be exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(7)(C), even though the specific request for information in that case was limited to that information which had already appeared in the public record.

U.S. Dept. of Justice v. Reporters Committee establishes that privacy interest is not coextensive with secrecy of information. "The fact that an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt.1, p. 18 (Sept. 26-27, 1974). Id at 1480.

In *Reporters Committee* the Court reasoned:

> To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. 14/ Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of

time rendered it private. According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public."

See Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 Law & Contemp. Prob. 342, 343-44 (1966)("Hardly anyone in our society can keep altogether secret very many facts about himself. Almost every such fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure").

Id at 1476 (footnotes 15 & 16 omitted)

Congress has mandated in §6103 that return information be confidential. One goal of this legislation is "to encourage full and honest reporting of income tax." See S. Rep. No. 938, 94th Cong., 2nd Sess. 318, reprinted in 1976 Code Cong. & Admin. News 3747. Another goal

was to curtail "loose disclosure practices by the IRS." See 122 Cong. Rec. 24013 (1976)(remarks of Sen. Weicker). The entire premise upon which §6103 is based is that return information is "intended for or restricted to the use of a particular person or group or class of persons" and that it is "not freely available to the public." See *U.S. Dept. of Justice v. Reporters Committee*, supra.

It is incongruous to prohibit the release of admittedly public information under the FOIA, a statute designed to promote disclosure, on the grounds that release would transgress the privacy interest of the citizen in the information, and at the same time permit disclosure of information subject to statutorily imposed strict confidentiality merely because that information had been disclosed in some public record. Such a rule pays too much homage to the fiction that every item in a public

record in known to the whole world, such that further dissemination can do no additional harm to privacy. See *Thomas v. United States*, 890 F.2d 18, 64 AFTR 2d 89-5853 (7th Cir. 1989).

Disclosures of the type here at issue are personal in character and potentially embarrassing or harmful. Petitioners submit that there is no need to balance their privacy interests in their return information against any governmental interest.[2] Section 6103 requires that "return information *shall be confidential* * * *," and shall not be disclosed unless authorized. Confidentiality of return information is not lost or forfeit merely because it is the subject of public disclosure such as filing of notice of tax lien.

---

[2]This balancing has already been addressed by Congress in §6103's carefully limited disclosure for legitimate needs. See *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987)

Plaintiff submits that tax return information, which taxpayers submit to the IRS under compulsion and threat of criminal penalties, see *Stokwitz*, supra, does not lose its confidentiality in the hands of the IRS merely because that information may be placed in the public record in some manner. *U.S. Dept. of Justice v. Reporters Committee*, supra. While further disclosure of the public information, or the reporting thereof, might not violate §6103, *Thomas v. U.S.*, supra, disclosure by the IRS of return information where that disclosure is wholly unrelated to the prior disclosure does violate §6103.

Here the IRS was not merely reporting or further publicizing the prior disclosures. The levies did considerably more than republish the prior lawful disclosure. They were administrative seizure of Petitioners' assets.[3] That

---

[3]In *Allen*, the levies violated the automatic stay of 11 U.S.C. §362 and one violated the injunction of 11 U.S.C. §524.

is a palpable difference, and demonstrates the tendency of this type of disclosure to embarrass or cause harm.

III. *A DISCLOSURE WHICH DOES NOT SERVE A LEGITIMATE GOVERNMENTAL PURPOSE OR WHICH IS NOT MADE IN RELIANCE ON A PRIOR LAWFUL DISCLOSURE VIOLATES §6103 EVEN IF THE RETURN INFORMATION DISCLOSED HAS BEEN LAWFULLY DISCLOSED AND IS NO LONGER CONFIDENTIAL.*

Even if public disclosure of return information vitiates confidentiality, such a rule should be subject to an exception where the government has not relied on the prior disclosure as authority for the contested disclosures, or where there is no demonstrable legitimate

governmental purpose to be accomplished by disclosing the information.

If a balance must be drawn between a taxpayer's reasonable expectations of privacy and the government's legitimate interests in disclosing tax return information, then the government should be able to demonstrate some legitimate interest in making the disclosure.

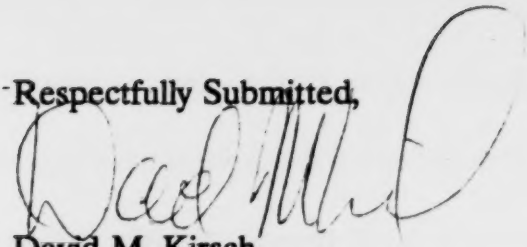
The IRS ought not be permitted to make indiscriminate disclosure merely on the basis of prior lawful disclosure. The purposes of §§6103 and 7431 will be preserved by requiring of the government some demonstrable legitimacy before permitting unrestrained disclosures. In light of the overall policies reflected in §6103 Petitioners submit that the fact of lawful disclosure is not a blanket waiver *for all purposes* of all notions of confidentiality. See *U.S. Dept. of Justice v. Reporters Committee*, supra,

and *Thomas*, supra. Before disclosures of the type here under consideration the government should be required to have some good reason to make the disclosure. In the absence of such a good reason, the strong congressional policy against disclosure should prevail.

CONCLUSION

In view of the split between the Ninth and Tenth Circuit Courts of Appeal concerning the confidential nature of return information which has been disclosed on the public record, the fact that taxpayers retain a significant privacy interest in such information in the hands of the Internal Revenue Service notwithstanding such disclosure, and the fact that no legitimate governmental interest is promoted by sanctioning illegal levies, the Court should grant the petition for writ of certiorari.

Respectfully Submitted,



David M. Kirsch
Four North Second Street
Suite 825
San Jose, CA 95113
Telephone: (408) 286-9700

Counsel for Petitioners

October 3, 1991

(Appendices follow)

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION, *Plaintiff-Appellee,* v. UNITED STATES OF AMERICA, *Defendant-Appellant.*	No. 88-2495 D.C. No. CV-86-6483-AJZ
HAROLD E. ALLEN, *Plaintiff-Appellee,* v. UNITED STATES OF AMERICA, *Defendant-Appellant.*	No. 90-15348 D.C. No. 89-20250-RPA OPINION

Appeal from the United States District Court
for the Northern District of California
Alfonso J. Zirpoli, Senior District Judge, Presiding
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
October 1, 1990—San Francisco, California

Filed July 5, 1991

Before: Richard H. Chambers, Mary M. Schroeder and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Taxation

Reversing a district court judgment, the court of appeals held that the recording of federal tax liens in the County Recorder's Office and the filing of a bankruptcy petition placed tax information in the public domain, no longer confidential, and without resulting liability on the government for its disclosure.

An accounting firm became delinquent in paying federal employment taxes and filing corporate income tax returns. A first notice of tax levy was issued by the IRS. A subsequent tax levy contained additional tax liabilities. However, the government did not give the accounting firm notice of its intent to levy for these additional periods and taxes. Notices of federal tax liens were recorded against it at the County Recorder's Office disclosing the taxes and tax periods involved, the dates of assessment, tax identification number, and the unpaid balance of the assessments. Previously, the accounting firm had filed for bankruptcy. Suit was filed against the government for the unauthorized disclosure of confidential tax information with respect to a taxpayer in violation of any provisions of IRC Section 6103. The district court denied the government's motion for summary judgment.

[1] Disclosure of return information that is not confidential does not violate IRC Section 6103. A prerequisite to liability under Section 7431, therefore, is the confidentiality of the disclosed information. [2] In this case, the return information disclosed by the federal tax levies was previously disclosed in notices of federal tax liens recorded in the County Recorder's Office. [3] Disclosure of the information by the recording of the lien was provided for statutorily. [4] Indeed, the purpose of recording the lien, unlike including tghe information in court documents, is to place the public on notice of the tax

lien. THerefore, the information placed on file at the Recorder's Office was no longer confidential and could be disclosed again without regard to section 6103. [5] The district court's attempt to distinguish *Lampert* was erroneous. The statute in question was not intended to be applied differently to IRS employees than it is to other government employees as the district court apparently believed. [6] The fact that the taxpayer initiated the judicial proceedings made the information no less public than records in other court proceedings. Also, the filing of the bankruptcy proceedings made the information no less public than records in other court proceedings. Thus, there was no liability for disclosure of such information under section 7431.

COUNSEL

Nancy Morgan, Tax Division, United States Department of Justice, Washington, D.C., for the defendant-appellant.

David M. Kirsch, San Jose, California, for the plaintiffs-appellees.

OPINION

BRUNETTI, Circuit Judge:

These consolidated appeals present two issues. First, whether tax return information that is included in notices of federal tax liens recorded in a California County Recorder's office, and in a bankruptcy petition filed by the taxpayer, is confidential within the meaning of 26 U.S.C. § 6103. Second, if the tax return information was confidential within the meaning of that section, whether the disclosure of that information in improperly issued notices of levy may give rise to liability under 26 U.S.C. § 7431. We have jurisdiction under

28 U.S.C. § 1291. Because we decide that the tax return information was no longer confidential we do not decide the second issue.

FACTS AND PROCEEDINGS

A. *Schrambling v. United States.*

In 1979, appellee William E. Schrambling Accountancy Corporation ("Corporation") became delinquent in paying federal employment taxes and filing corporate income tax returns. In May, 1984, Revenue Officer Cheryl Matthews was assigned to collect the Corporation's delinquent taxes and tax returns. In June, 1984, Matthews delivered a Final Notice and Demand pursuant to 26 U.S.C. § 6331(d), to William Schrambling, the President and sole shareholder of the Corporation. The notice covered delinquent employment taxes for six tax quarters in 1981 and 1982.

On October 4, 1984, the Corporation's case was reassigned to Revenue Officer Charles Stegner. On October 9, 1984, Stegner mailed sixteen notices of levy to banks. On November 6, 1984, Stegner mailed notices of levy to the twenty-two largest accounts receivable of a partnership of which the Corporation was a partner. On November 20, 1984, and November 21, 1984, Stegner mailed notices of levy to the remaining fifty-five accounts receivable of the partnership. (The notices of levy issued on November 6, 20, and 21 are hereinafter "November levies"). Prior to issuing the November levies, Stegner obtained an update on the Corporation's tax liabilities which identified additional taxes and tax periods for which the Corporation owed taxes. Stegner listed these additional taxes and tax periods on the November levies. The November levies thus included tax return information not listed on the June Notice of Final Demand issued by Matthews. The government concedes that the failure to notify the Corporation of the intent to levy for these additional periods and taxes violated 26 U.S.C. § 6331(d).

Notices of federal tax lien were recorded against the Corporation with the San Francisco County Recorder on four dates in 1982 and 1984 disclosing the name of the Corporation, the taxes and tax periods involved, the dates of assessment, the Corporation's tax identification number, and the unpaid balance of the assessments. It is undisputed that the information disclosed in the November notices was disclosed in the recorded notices of tax lien.

On November 19, 1986, the Corporation filed a complaint for damages pursuant to section 7431 of the Internal Revenue Code. This section provides a private cause of action for damages against the United States "[i]f any officer or employee of the United States knowingly, or by reason of negligence, discloses any return information with respect to a taxpayer in violation of any provisions of Section 6103." 26 U.S.C. § 7431. Section 6103(a) provides the general rule that "[r]eturns and return information *shall be confidential*, and except as authorized by this title . . . no officer or employee of the United States, . . . shall disclose any return or return information . . . ." 26 U.S.C. § 6103(a) (emphasis added). The Corporation alleged that issuing the November levies constituted an unauthorized disclosure of confidential tax information. The Corporation sought compensatory damages in the amount of $847,000 and punitive damages in the amount of $847,000 against both Stegner and the government. Stegner was voluntarily dismissed as a party on December 17, 1984.

The government moved for summary judgment, contending that the disclosed return information was no longer confidential because of the recording of federal tax liens in the San Francisco County Recorder's office. Such recording, the government claimed, made the information a matter of public record to which no reasonable expectation of privacy could attach. The district court denied the motion and a motion for reconsideration.

After a court trial, the district court held that the Corporation's claim based on the twenty-two notices of levy sent on

November 6, 1984, were barred by the statute of limitation. *William E. Schrambling Accountancy Corp. v. United States*, 689 F. Supp. 1001, 1006 (N.D. Cal. 1988). As to the remaining fifty-five notices, the district court held that the disclosure of tax return information in the improper November levies violated 26 U.S.C. § 6103. *Id.* at 1007. The district court found the government liable for $55,000 in damages. *Id.* at 1008.

B. *Allen v. United States.*

Appellee Harold Allen owed federal income taxes for years 1980 through 1983. Assessments for these taxes were made in March, 1984. Two notices of federal tax liens were recorded in the Santa Clara County Recorder's Office in 1984. A wage levy was issued to Allen's employer for the 1980 assessment.

On November 3, 1988, Allen filed a petition under Chapter 7 of the Bankruptcy Code. The government was enjoined from collecting from the plaintiff for any claim that arose prior to the bankruptcy filing. On November 9, 1988, the government released the wage levy. On November 20, 1988, the Internal Revenue Service ("IRS") issued a new wage levy for the 1980 assessment. This levy was released on December 20, 1988. A third levy was issued on December 11, 1988, to Allen's bank.

In March, 1989, Allen and the government filed a stipulation in Allen's bankruptcy case that the 1980 assessments were dischargeable. On April 24, 1989, the government mailed a "Final Notice of Intention to Levy" to Allen concerning the 1980 assessment. On April 26, 1989, Allen filed suit seeking damages under 26 U.S.C. § 7431. On May 2, 1989, Allen sent the government a letter advising of Allen's bankruptcy and included the stipulation discharging his tax liability. On May 28, 1989, the government issued a fourth levy to Allen's bank.

It is not disputed that the first levy, issued prior to the institution of bankruptcy proceedings, was proper. It is also undisputed that the second and third levies were issued in violation of 11 U.S.C. § 362(a)(6) (bankruptcy petition operates as a stay of any collection, assessment, or recovery of a claim against the debtor arising prior to commencement of the bankruptcy case). The government does not contest the district court's finding that the fourth levy violated 26 U.S.C. § 6331. The information in each of the three improper levies appeared in the notice of tax lien recorded in the Santa Clara County Recorder's Office and in Allen's bankruptcy petition.

In granting Allen's, and denying the government's, motion for summary judgment, the district court stated, "since there is no necessity or authority to issue an invalid levy, disclosure of information in an invalid levy constitutes violation of § 6103." The court also held that the prior publication of the disclosed information in recorded tax liens and in Allen's bankruptcy petition did not destroy the confidential nature of the information.

ANALYSIS

[1] Disclosure of return information that is not confidential does not violate Section 6103. *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989). A prerequisite to liability under Section 7431, therefore, is the confidentiality of the disclosed information.

[2] In the present cases, the return information disclosed by the federal tax levies was previously disclosed in notices of federal tax liens recorded in the County Recorder's office. In *Allen*, the information was also disclosed in Allen's petition for bankruptcy. In both cases, the government argued in motions for summary judgment that the recording and bankruptcy filing made the information a matter of the public record and therefore no longer confidential.

[3] Disclosure of the information by the recording of the lien is provided for statutorily. *See* 26 U.S.C. §§ 6321, 6323(a),(f). The government argues that such authorized disclosure destroys the confidential nature of the information and the government cannot, as a matter of law, be liable under Section 6103 for a later, even if unauthorized, disclosure of the information. The government relies on several cases holding that once tax return information enters the public domain, the information is no longer confidential. *See Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988) ("Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information"); *Thomas v. United States*, 671 F. Supp. 15, 16 (E.D. Wis. 1987) ("[o]nce tax return information enters the public domain, the taxpayer no longer has any privacy interests in that information"), *aff'd*, 890 F.2d 18 (7th Cir. 1989); *United States v. Posner*, 594 F. Supp. 930, 936 (S.D. Fla. 1984) (once federal tax return information "is in the public domain . . . the entitlement to privacy is lost"), *aff'd*, 764 F.2d 1535 (11th Cir. 1985); *Cooper v. I.R.S.*, 450 F. Supp. 752, 755 (D.D.C. 1977) (documents properly released to the tax court "became part of the public record, thereby losing all semblance of confidentiality").

The district courts disagreed. In *Schrambling*, the court distinguished the above cases from the present case because they each involved an initial disclosure in *judicial proceedings*. In *Lampert, supra*, for example, the Ninth Circuit decided three cases (*Lampert v. United States, Peinado v. United States*, and *Figur v. United States*). In *Lampert*, the government filed an action seeking an injunction against the defendant's promotion and sale of abusive tax shelters. The U.S. Attorney and the Internal Revenue Service later issued press releases relating to the action. In *Peinado*, the U.S. Attorney issued press releases announcing that the defendant pled guilty to tax evasion and was sentenced. In *Figur*, the U.S. Attorney issued a press release summarizing tax evasion charges against the defendant. In each case there was an initial disclosure of

information in a judicial proceeding which was authorized under the Internal Revenue Code, and a later disclosure (press release) that was not specifically authorized by the Code. The taxpayers brought actions under Section 7431 alleging the press releases wrongfully disclosed confidential information. This court held that "if a taxpayer's return information is lawfully disclosed in a judicial proceeding . . . the information is no longer confidential and may be disclosed again without regard to Section 6103." *Lampert*, 854 F.2d at 337-38.

The *Schrambling* district court found *Lampert* and other similar cases distinguishable from the present case by reasoning, while "[t]he decision to bring a criminal prosecution is governed by strong institutional constraints[,] . . . a notice of lien is a relatively informal matter. It does not begin an adversarial proceeding and is not subject to judicial review."

This reasoning is unpersuasive. The relevant inquiry should focus on whether the prior authorized disclosure, here the recording of a tax lien, destroys the confidential nature of the information. We are concerned with the *effect* of recording the lien, not its "informality." Documents filed in the county recorder's office in California are public records. These records are open for public inspection at all times the office is open and "every citizen has a right to inspect" them. Cal. Gov't Code § 6253 (West Supp. 1990).

[4] Indeed, the purpose of recording the lien, unlike including the information in court documents, is to place the public on notice of the lien. The act of recording "provides constructive notice of the contents of the documents creating the [lien]." *Bluxome Street Assoc. v. Fireman's Fund Ins. Co.*, 206 Cal. App. 3d 1149, 1158 (1988) (citing Cal. Civ. Code § 1213 providing that lien "recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees"). Recording the information in the County Recorder's office thus exposes the information to as

much, if not greater, publicity than publication in a judicial proceeding. We find, therefore, that the information placed on file at the Recorder's Office is "no longer confidential and may be disclosed again without regard to section 6103." *Lampert*, 854 F.2d at 338.

In *Allen*, the district court did not separately analyze the effect on the confidential nature of tax return information by the recording of tax liens and by Allen's inclusion of the information in his bankruptcy petition. The district court attempted to distinguish *Lampert* by reasoning, "[i]t was a government official *other than* the I.R.S. which broadcasted information made public in a criminal proceeding." *Lampert* is thus "at odds" with this case, the court stated, because here "it was the *I.R.S. itself* which disclosed the tax return information."

[5] The district court's attempt to distinguish *Lampert* is erroneous. First, contrary to the district court's reading of the facts in *Lampert*, a disclosure by the I.R.S. *was* at issue. Although most of the disclosures were made by the U.S. Attorneys Office, one disclosure was also made by the I.R.S. *Lampert*, 856 F.2d at 336. No distinction was made in *Lampert* between the disclosures made by the U.S. Attorneys Office and that made by the I.R.S. Also, no such distinction is made by Section 6103. That section provides that "no *officer or employee of the United States* . . . shall disclose any return or return information . . . ." 26 U.S.C. § 6103(a) (emphasis added). Section 7431 similarly refers to "any officer or employee of the United States." 26 U.S.C. § 7431(a)(1).[1] The statute is thus not intended to be applied differently to I.R.S.

[1]This language is contrasted with the language used in Sections 7432 and 7433. These sections provide a civil damage remedy for failure to release improper liens, 26 U.S.C. § 7432, and for unauthorized collection activities, 26 U.S.C. § 7433. These statutes apply, unlike Section 7431, only if the improper activity was by an "officer or employee of the *Internal Revenue Service*." 26 U.S.C. §§ 7432(a), 7433(a) (emphasis added).

employees than it is to other government employees as the district court apparently believed.

[1] The effect of the inclusion of the disclosed information in Allen's previously filed bankruptcy presents a separate wrinkle in the *Allen* case. *Lampert*, even if interpreted narrowly, is clearly controlling. "Once information is lawfully disclosed in court proceedings, '§ 6103(a)'s directive to keep return information confidential is moot.' " *Lampert*, 854 F.2d at 338 (quoting *Figur v. United States*, 662 F. Supp. 515, 517 (N.D. Cal. 1987)). The fact that the taxpayer, unlike the taxpayers in *Lampert*, initiated the judicial proceedings lends additional strength to the government's argument that the information was no longer confidential. Also, the filing of the information in bankruptcy court proceedings makes the information no less public than records in other court proceedings. "[A] paper filed in a case under [the Bankruptcy Code] and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107.

CONCLUSION

The recording of a federal tax liens in the County Recorder's Office and the filing of a bankruptcy petition places information in the liens and petition in the public domain. Because information in the public domain is no longer confidential there can be no violation of Section 6103 and, consequently, no liability for disclosure of such information under Section 7431. In the present cases the information disclosed in the improper levies was previously placed in the public domain and the government cannot, therefore, be liable for such disclosure under Section 7431. We do not reach the question of whether improperly issued levies, containing confidential tax return information, may constitute a violation of Section 6103.

The judgments as to both appellees are reversed for entry of judgments in favor of the United States.

REVERSED.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC—SAN FRANCISCO—(415) 588-1155

APPENDIX "B"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. C 86-6483 AJZ

JUDGEMENT

In accordance with this court's findings of fact, conclusions of law, and memorandum of decision dated February 10, 1988,

IT IS HEREBY ORDERED AND ADJUDGED that judgement is entered in favor of plaintiff in the sum of $55,000, plus reasonable costs of litigation.

Dated: February 10, 1988

/s/ Alfonso J. Zirpoli
Alfonso J. Zirpoli
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. C 86-6483 AJZ FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF DECISION

FINDINGS OF FACT

1. Plaintiff, the William E. Schrambling Accountancy Corporation, (hereinafter the "corporation"), is a California corporation engaged in the business of public accounting. William E. Schrambling (hereinafter "Schrambling") is the president and sole owner of the corporation.

2. Beginning in December 1979, the Corporation became delinquent in paying its federal employment taxes, including trust fund taxes withheld from employee wages. As of June, 1982, assessments had been made against the Corporation for employment taxes in excess of $37,000 for

periods in 1979, 1980, 1981, and for the first quarter of 1982. The Corporation was also delinquent in filing corporate income tax returns.

3. On three occasions in 1981 and 1982, the corporation filed quarterly employment tax returns, enclosing checks which were subsequently returned for insufficient funds:

Tax Quarter	Date Check Presented	Amount of Check
9-30-81	11-04-81	$ 14,339.44
12-31-81	2-03-82	$5,528.35
6-30-82	8-04-82	$9,583.06

The Corporation did not subsequently satisfy these delinquencies.

4. On June 14, 1982, Howard J. Schwartz, a senior revenue officer, was assigned to collect the Corporation's delinquent taxes and to investigate the Corporation's delinquent tax returns. Schrambling represented to Schwartz that he would be able to pay the Corporation's tax liability from proceeds of an upcoming loan. Relying on this represen-

tation, Schwartz delayed filing federal tax liens or pursuing levy action until June 30, 1982, the agreed-upon date by which Schrambling would pay the delinquent taxes. Schwartz did not hear from Schrambling or receive funds to pay the delinquent taxes by July 1, 1982. On July 2, 1982, Schwartz issued two bank levies. He received $98.38 from these levies.

5. After the levies were issued, Schrambling spoke with Schwartz. Schrambling promised that he would file the delinquent tax returns shortly and that he would make federal tax deposits. Schrambling did not file the tax returns until August, 1984, and he did not make federal tax deposits.

6. After Officer Schwartz levied Schrambling's corporate accounts, Schrambling stopped using the corporate accounts and used his personal accounts to pay corporate bills.

7. On or about July 1, 1982, the Corporation formed a partnership with Jack Chu. Schrambling and Chu was a California general partnership engaged in the accounting business. When the part-

nership was formed, Schrambling transferred all of the assets and liabilities, except federal taxes, to the partnership. Schrambling did not inform Jack Chu that the Corporation was delinquent in filing tax returns or paying taxes.

8. In July, 1983, the partnership became delinquent in payroll taxes. Revenue officer Cheryl Matthews was assigned to collect the delinquent taxes. During the course of discussions with Matthews, Jack Chu provided her with a list of accounts receivable for the partnership. On the bottom of the list was a notation that the list was confidential and that the IRS was not authorized to contact any clients on the list without prior consent by Schrambling and Chu. Neither Matthews nor any other revenue officer agreed to be bound by the notation. Schrambling and Chu eventually paid the delinquent taxes.

9. In May, 1984, Cheryl Matthews was assigned to collect the Corporation's delinquent taxes and tax returns. She was the fourth officer assigned to the case. Although Matthews met with Schrambling several times to discuss methods of

paying the delinquent taxes, Schrambling did not voluntarily pay the taxes.

10. On or about June 14, 1984, Matthews hand delivered a Final Notice and Demand to Schrambling. The notice covered the following tax periods:

Form Number	Tax Period
941	06-30-81
941	06-30-81
941	12-31-81
941	03-31-81
941	06-30-82
941	12-31-82

11. In August, 1984, after Matthews issued a summons, Schrambling delivered fifteen delinquent tax returns to Matthews. Schrambling did not make any payments on the returns, however.

12. On October 4, 1984, the Corporation's case and the partnership's case were reassigned to revenue officer Charles Stegner.

13. Upon receiving the case files for the Corporation and the partnership, Stegner reviewed the files, including the

histories maintained by the prior revenue officers assigned to the cases. He read that Schrambling had given the IRS checks to pay the Corporation's taxes which were returned for insufficient funds. He reviewed the past written demands for payment sent to Schrambling. He read about the transfer of corporate assets to the partnership. Stegner read that Schrambling had stated that he did not have a corporate bank account for the Corporation. Based on his experience as a revenue officer, Stegner thought that there probably was a corporate bank account. There was extensive evidence in the file indicating that revenue officers had been discussing and requesting payment from Schrambling for more than two years and that Schrambling had not followed through on commitments to pay the Corporation's taxes or to file its returns. Based on this information, Stegner formed the impression that contact with the taxpayer would not yield funds or financial information, and that levying would be an appropriate step.

14. On October 9, 1984, Stegner mailed out sixteen levies to banks, but he did not receive any funds.

15. After receiving no funds from the bank levies, Stegner decided to levy clients of Schrambling and Chu. Stegner used the accounts receivable list from the partnership file to determine who was to receive notices of levy. Stegner believed that the clients on the accounts receivable were possibly also clients of the Corporation. He based this belief on the close relationship between the partnership and the Corporation, the fact that Schrambling did not perform accounting services exclusively for the partnership, and the belief that there was possibly commingling of funds between the two entities. Schrambling and Chu did not authorize the IRS to contact these clients.

16. On or about October 31, 1984, Stegner discussed the possibility of issuing levies to clients of the partnership to collect Corporation taxes with his group manager, Curtis Chan. Chan approved of Stegner's decision to send out the levies.

17. On November 6, 1984, Stegner mailed notices of levy to the twenty-two largest accounts receivable on the partnership list. Since the partnership had not paid its delinquent taxes by this time, Stegner included levies for the partnership taxes in the same envelopes. Schrambling became aware of these levies prior to November 19, 1984.

18. On November 8, 1984, Jack Chu delivered payment for the partnership taxes to Stegner. Upon receipt of this payment, Stegner issued a Release of Levy to each of the persons who received the Notice of Levy for the partnership.

19. On November 16, 1984, a revenue officer who was handling another account for which Schrambling owed taxes informed Stegner that Schrambling was considering filing bankruptcy.

20. Although Stegner received no money from the November 6, 1984 levies, he received some written responses that indicated that some of the clients had recently paid funds to the Corporation.

21. On November 20, 1984, and November 21, 1984, Stegner mailed out Notices of Levy to the remaining fifty-five

clients on the partnership accounts receivable list.

22. In issuing the Notices of Levy on October 9, 1984, November 6, 1984, November 20, 1984, and November 21, 1984, Stegner relied on the Notice of Final Demand issued by Cheryl Matthews on June 12, 1984.

23. The levies issued after November 19, 1984 covered the following tax periods that were not listed on the Notice of Final Demand issued June 12, 1984:

Form Number	Tax Period
941	9/30/79
941	12/31/83
940	12/31/80
940	12/31/81
940	12/31/82
940	12/31/83

The IRS did not send a notice of final demand and intent to levy for these periods prior to November 19, 1984.

24. Plaintiff's tax delinquency did not constitute a jeopardy situation.

25. Subsequent to the issuance of the levies, Stegner received two $1,000.00 payments from Schrambling to be applied against the Corporation's tax liability. No other payments were received. In February, 1985, Stegner decided that the Corporation's tax liability was uncollectible from the Corporation, and that collection of the 100 percent penalty assessment should be pursued against Schrambling individually under 26 U.S.C. 6672.

Conclusions Of Law

1. All federal tax returns and return information are confidential, and except as authorized by Title 26 of the United States Code, no officer or employee of the United States may disclose such information in any manner in connection with his official duties. 26 U.S.C. 6103(b).

2. Internal revenue officers or employees may disclose return information in connection with their official duties "to the extent that such disclosure is necessary in obtaining correct determination of tax, liability for tax, or the amount to be collected or with respect to the

enforcement of any other provision of this title." 26 U.S.C. 6103(k)(6). Under section 6103(k)(6), a revenue officer is authorized to disclose return information in a proper notice of levy because disclosure is necessary to achieve the purpose of the notice.

3. A taxpayer is authorized to bring a civil action against the United States if:

> any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 ... .

The United States is not liable under section 7431 for disclosures resulting from "a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b).

4. The period of limitations for bringing suit under Section 7431 is two years from the date of discovery of the unauthorized disclosure of tax information. 26 U.S.C. 7431(d).

5. The Secretary of the Internal Revenue Service or his delegate may collect taxes by levy upon all property and

rights to property belonging to a taxpayer if that taxpayer neglects or refuses to pay delinquent taxes within ten days after notice and demand. 26 U.S.C. 6331. The Secretary must notify the taxpayer in writing of his intent to levy, and such notice must be 1) given in person, or 2) left at the dwelling or usual place of business of such person, or 3) sent by certified or registered mail to such person's last known address no less than ten days prior to levy.

6. The final demand notice required by 26 U.S.C. 6331(d) is in addition to the notice and demand required by 6331(a), and a form letter 1058 (DO) may be used for this purpose. See Internal Revenue Service Manual, Part V, 5361(2).

7. A levy is proper under Section 6331 if it is made:

1) after compliance with the notice and demand requirements of 6303, 6331(d)(1);
2) for the purpose of collecting taxes;
3) upon property or rights to property of the taxpayer or

upon property on which there is a tax lien.

8. If the United States is found liable for an unauthorized disclosure under section 7431(a), the government is liable to the taxpayer for damages equal to the sum of:

1) the greater of --
A) $1,000.00 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, OR
B) the sum of --
i) actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus
ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus
2) the costs of the action.

26 U.S.C. 7431(c).

9. The "costs of the action" include reasonable attorneys' fees. Huckaby v. United States Dept. of Treasury, 804 F.2d 297, 298 (5th Cir. 1986); 26 U.S.C. 7430(c)(1)(A)(ii)(I).

Memorandum Of Decision

The above-captioned case came on for trial in this court on October 19, 1987. The issue to be resolved is whether plaintiff, William E. Schrambling Corpor-

ation, is entitled to damages under 26 U.S.C. 7431 for seventy-seven notices of levy sent by revenue officer Charles Stegner in an effort to collect delinquent taxes owed by plaintiff. This memorandum is based on the preceding conclusions of law and findings. Discussion

I. Statute of Limitations

As a threshold matter, the court must determine whether plaintiff's claims fall within the statute of limitations. The period of limitations for bringing suit under 26 U.S.C. 7431 is two years from the date of discovery of the unauthorized disclosure of tax information. 26 U.S.C. 7431(d). Plaintiff's suit was filed on November 19, 1986. Revenue Officer Charles Stegner mailed out the first twenty-two levies on November 6, 1984. The parties have stipulated that plaintiff learned about these levies prior to November 19, 1984. Thus, plaintiff's claims regarding the first set of levies are barred by the statute of limitations.

Defendant mailed the second set of levies on November 20, 1984 and November 21, 1984. Since plaintiff could not have

discovered these levies until after November 19, 1984, plaintiff is entitled to proceed as to these levies.

II. Disclosure of Return Information

To prevail under section 7431, plaintiff must show that an officer or employee of the United States knowingly, or by reason of negligence, disclosed return information in violation of any provision of 26 U.S.C. 6301. Section 6301 provides that all tax return information is confidential and may not be disclosed except as authorized by the Internal Revenue Code. Section 6301(k)(6) authorizes disclosure "to the extent disclosure is necessary in obtaining correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of" the Internal Revenue Code.

Section 7431(b) exempts from liability any disclosures resulting from "a good faith, but erroneous interpretation of section 6103."

Thus, defendant is not liable for disclosures if 1) they are necessary to

enforce any provision of the Internal Revenue Code, or 2) the employee's actions were based on a good faith interpretation of section 6103.

In the present case, the disclosures at issue were notices of levy. Revenue officers are authorized to disclose return information in a proper notice of levy because disclosure is necessary to achieve the purpose of the notice. See 26 U.S.C. 6331. However, improper notices of levy may be grounds for liability under section 7431. Rorex v. Traynor, 771 F.2d 383 (8th Cir. 1985).

III. Propriety of the Notices of Levy

A levy is proper if it is made:

1) after compliance with the notice and demand requirements of 6303 and 6331(d)(1);
2) for the purpose of collecting taxes;
3) upon property or rights to property of the taxpayer or upon property on which there is a tax lien.

See generally 26 U.S.C. 6331.

There is no dispute in this case that the levies were issued for the purpose of collecting taxes. Revenue officers had been trying to collect delinquent taxes from plaintiff for more than two years. Officer Stegner testified that he believed that levies were the only method that could produce funds to pay the taxes.

The parties dispute whether the levies were directed to "property or rights to property of the taxpayer." Officer Stegner sent the notices of levy to accounts receivable of Schrambling and Chu, a partnership in which plaintiff was a partner. Plaintiff claims that the IRS knew that these clients did not owe money to plaintiff; they were not plaintiff's clients. However, Officer Stegner had reasonable grounds to believe that some of the partnership clients could owe money to plaintiff. First, plaintiff's partner, Jack Chu, testified that plaintiff brought some clients into the partnership. Second, when Officer Stegner received responses from the first set of levies, many clients indicated that they

had paid funds to the taxpayer during the past year.

Although no court has yet articulated the degree of factual certainty that is required before a revenue officer can levy property, this court is guided by the IRS's interpretation of section 6331. See United States v. National Bank of Commerce, 472 U.S. 713 (1985) ("The IRS's understanding of the terms of the Code is entitled to considerable deference."). The IRS Manual provides that "a notice of levy should be served only when there is evidence or reasonable expectation that the third party has property or rights to property of the taxpayer." See Timmerman v. Swenson, 79-2 U.S.T.C. (CCH) ¶ 9588, at 88,140. Officer Stegner's belief that the clients of the partnership might also owe money to plaintiff was reasonable, and thus levying the partnership clients was not improper.

The parties also dispute whether Officer Stegner complied with the Notice and Demand requirement of Section 6331(d)(1). Section 6331(d)(1) requires that ten days prior to taking levy action, the IRS must notify the taxpayer of

its intention to levy. The notice must be given in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail to the person's last known address. 26 U.S.C. 6331(d)(1).

Prior to mailing out the fifty-five notices of levy on November 20th and 21st, Officer Stegner did not deliver a final notice and demand to plaintiff. Rather, he relied on a letter 1058 that Officer Cheryl Matthews delivered to plaintiff on June 14, 1984. However, this letter 1058 did not include all of the tax periods covered by the notices of levy. See Finding of Fact No. 22. Thus, plaintiff never received notice of intention to levy as to those periods. Officer Stegner did not act improperly in issuing notices of levy as to the periods for which plaintiff had received notice of intention to levy, but the notices were nevertheless improper because they included tax information regarding periods for which plaintiff had not received notice.

IV. Good Faith Defense

Even though the notices of levy were improper, defendant is not liable for damages if the officer's actions were based on a "good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b).

In Huckaby v. United States Dept. of Treasury, 794 F.2d 1041 (5th Cir. 1986), the court adopted an objective standard to determine whether the good faith exception applied. The court stated that the relevant inquiry is "whether a reasonable IRS agent would have known of rights provided by [the sections at issue], and of his own agency's applicable regulations and internal rules." Id. at 1048. Using this standard, if an officer should know the procedures he should follow, and he does not follow them, he is not acting in good faith. In the present case, Officer Stegner should have been aware that plaintiff was entitled to final notice and demand as to each period covered by the notice of levy. He should have known that the previous notices sent by the Service Center would not suffice. The Internal Revenue Service Manual for Revenue Officers clearly states that "the

Service must notify the taxpayer in writing of the Service's intention to levy. This notice is in addition to the notice and demand required by IRC section 6331(a) ... ." Manual, Part V, 5361. Although Officer Stegner knew or should have known that plaintiff was entitled to final notice and demand, he did not exercise care in relying on the letter 1058. Even a cursory glance at the letter would indicate that it did not cover all of the periods that Officer Stegner intended to include in the notices of levy. Thus, applying the Huckaby test, Officer Stegner did not act in good faith.Further, even a plain reading of the good faith exception indicates that it does not apply in this case. The good faith exception applies to good faith, but erroneous interpretations of section 6103. Here, Officer Stegner was not acting under a misinterpretation of section 6103. Rather, he was acting under the misconception that plaintiff had received final notice and demand for all periods covered by the levies. In this regard, this case is similar to Husby v. United States, 672 F.Supp. 442 (N.D.Cal. 1987). In Husby, a

revenue officer served a notice of levy on plaintiff's credit union despite the fact that plaintiff had filed a Petition in Tax Court seeking redetermination of the deficiency. Defendant argued that since the disclosures were the result of honest mistakes, the good faith exception should apply. The court rejected this argument, stating that "7341(b) does not create a general good faith defense; on its face it applies only to good faith misinterpretations of 6103. Defendant fails to explain who, if anyone, made any such interpretations of the statute, or what the erroneous interpretation might have been." Id. at 445. Based on the foregoing, the good faith exception does not apply to this case.

V. Damages

If the United States is found liable for an unauthorized disclosure under section 7431(a), plaintiff may recover damages equal to the sum of:

1) the greater of --
A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or
B) the sum of --

i) actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

2) the costs of the action.

26 U.S.C. 7431(c). Thus, plaintiff is entitled to either $1,000 per act of disclosure or actual damages and punitive damages. In the present case, plaintiff has not proved actual damages. Rather, plaintiff seeks $1,000 per alleged act of disclosure, plus punitive damages. Since this court has no proof that actual damages exceed $1,000 per disclosure, the proper measure of damages is $1,000 per disclosure. Under subsection (A) of section 7431(c)(1), plaintiff is not entitled to punitive damages.

To calculate damages, the court multiplies $1,000 by the number of "act[s] of disclosure." The relevant "act" in this case is the mailing of a notice of levy. Plaintiff is thus entitled to $55,000, plus costs of the action. Defendant asserts that plaintiff's recovery should be limited to $38,000, since plaintiff can only prove that 38 people

received the notices of levy. However, section 7431(c)(1)(A) does not require proof of receipt. The $1,000 measure of damages provides an alternative to actual damages, thus allowing plaintiffs to recover damages even if they cannot prove actual damages. To require plaintiffs to prove receipt of the notices of levy would defeat the purpose of this alternative measure of damages.

Plaintiff also seeks attorneys fees. As noted above, section 7431(c) provides that plaintiff shall recover the costs of the action. 26 U.S.C. 7430(c)(1)(A)(ii)(I) defines "reasonable litigation costs" to include "reasonable fees paid or incurred for the services of attorneys in connection with the civil proceeding." Thus, plaintiff is also entitled to recover attorneys fees. See Huckaby v. United States Dept. of Treasury, 804 F.2d 297, 298 (5th Cir. 1986).

Conclusion

Based on the foregoing findings of fact, conclusions of law, and memorandum of decision, the court finds that the fifty-five notices of levy mailed by Revenue Officer Charles Stegner on November 20,

1984 and November 21, 1984 were not authorized by 26 U.S.C. 6103. Accordingly, judgment is entered in favor of plaintiff in the sum of $55,000, plus reasonable costs of litigation.

Dated: February 10, 1988

/s/ Alfonso J. Zirpoli
Alfonso J. Zirpoli
United States District Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HAROLD E. ALLEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. C 89 20250 RPA

JUDGEMENT

Pursuant to the Court Order of December _____, 1989, "Order Granting Plaintiff's Motion for Summary Judgement and Denying Defendant's Motion for Summary Judgement," judgement is HEREBY ENTERED for plaintiff Harold E. Allen, and against Defendant United States.

IT IS SO ORDERED.

Dated: January 3, 1990

/s/ Patricia V. Trumbull
PATRICIA V. TRUMBULL
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HAROLD E. ALLEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. C 89 20250 RPA

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

The Court has received, read, and considered plaintiff's motion for summary judgment, and defendant's opposition thereto and cross-motion for summary judgment. In addition, the Court heard oral argument on the matter. The parties consented to the jurisdiction of the Magistrate to enter judgment in this dispositive matter. See 28 U.S.C. § 636(c)(1). GOOD CAUSE appearing therefor, the Court finds and orders as follows.

INTRODUCTION

Plaintiff, a taxpayer, moves for summary judgment in this action on the grounds that the United States is liable under 26 U.S.C. § 7431 for issuance of two Internal Review Service ("IRS") levies issued in violation of the "automatic stay" provisions of the Bankruptcy Code, 11 U.S.C. §362, and for a levy issued after the tax assessment identified in the levy had been discharged in bankruptcy. Plaintiff contends that the levies constitute disclosure of the tax return information in violation of the Internal Revenue Code, 26 U.S.C. § 6103. The United States cross-moves for summary judgment on the grounds that it is not

liable for damages under 26 U.S.C. § 7431 for the issuance of these IRS levies.

These motions present several novel and controversial questions. Specifically, this Court must decide whether tax information disclosed in invalid levies is actionable under § 6103, and whether tax information previously made public can be confidential for the purposes of §6103 at the time it is disclosed by the IRS.

FACTUAL BACKGROUND

The material facts of this case are not in dispute. Plaintiff's liability for federal income taxes for the taxable year 1980 was assessed on March 19, 1984. Notices of federal tax liens were recorded in Santa Clara County. On September 27, 1988, a wage levy was issued to plaintiff's employer, the County of Santa Clara, indicating that plaintiff owed more than $17,000 for the taxable year 1980. Plaintiff does not contend that this first levy violated §7431.

On November 3, 1988, plaintiff filed a petition under Chapter 7 of the Bankruptcy Code in the San Jose Division

of the Bankruptcy Court for the Northern District of California. Plaintiff listed as a liability the federal income tax assessment for 1980 as in excess of $17,000. Defendant was thereafter enjoined from any act to collect or recover any claim against plaintiff that arose before the commencement of his bankruptcy proceeding. 11 U.S.C. §362.[1] On November 7, 1988, the IRS released the wage levy upon learning of plaintiff's bankruptcy filing from plaintiff's counsel.

On November 20, 1988, the IRS issued a second wage levy for the 1980 assessment to plaintiff's employer, even though defendant had been advised that plaintiff had filed for bankruptcy. This second levy was released on December 20, 1988.

On December 11, 1988, the IRS issued a third levy, this time to plaintiff's bank, American Savings and Loan

---

[1] Defendant did not seek or obtain relief from the bankruptcy stay in order to permit collection action.

Association.[2]

On March 27, 1989, plaintiff and the government filed a stipulation in plaintiff's bankruptcy proceeding that the 1980 assessments were dischargeable, and the Bankruptcy Court entered judgment accordingly.

Plaintiff filed his original complaint in this matter on April 26, 1989.

On April 24, 1989, defendant mailed to plaintiff a "Final Notice, Notice of Intention to Levy", concerning his 1980 tax liability. Plaintiff's counsel responded to this letter on May 2, 1989, advising defendant of plaintiff's bankruptcy, and including a copy of the Bankruptcy Court judgment concerning the dischargeability of plaintiff's 1980 liability.

On May 28, 1989, defendant issued a fourth levy for the 1980 tax assessment,

---

[2] Pursuant to this levy, the bank remitted the sum of $139.87 to defendant on December 16, 1988. This sum has yet to be returned to plaintiff, although the government has assured the Court that plaintiff's money will be returned posthaste.

again to plaintiff's bank. this levy was issued subsequent to plaintiff's bankruptcy discharge and the filing of the complaint in this action.

DISCUSSION

26 U.S.C. §7431(a)(1) permits a taxpayer to bring a civil action for damages against the United States in federal district court

> [i]f any officer or employee of the United States knowingly, or by reason of negligence, disclosed any return or return information with respect to a taxpayer in violation of any provision of section 6103....

Section 6103 requires that tax returns and return information be kept "confidential", and prohibits their disclosure except as authorized by the Internal Revenue Code. In order to recover under §7431, a taxpayer must show that" (1) the disclosure was unauthorized; (2) the disclosure was made knowingly or by reason of negligence; and (3) the disclosure was made in violation of §6103. Traxler v

United States, No. CV-F-87-725 REC. slip op. (E.D. Cal. Nov. 28, 1988), citing Flippo v. United States, 670 F. Supp. 638, 641 (W.D.N.C. 1987), aff'd per curiam, 849 F.2d 604 (4th Cir. 1988).

Plaintiff argues that defendant negligently or knowingly issued levies two, three and four, thereby violating § 6103, and subjecting the government to damages under §7431. Defendant argues that the levies did not violate any provision of § 6103 because the levy notices only disclosed information necessary to effect the levy. The government further argues that a levy issued in violation of the Bankruptcy Code[3] is not a per se violation of §6103.

---

[3] It is undisputed that levies two and three were issued in violation of the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362. Defendant states that the Bankruptcy Code provides the taxpayer/debtor with a

As to levies two through four, defendant alleges that the information about plaintiff's 1980 tax assessment was no longer confidential when the levies were issued--the information had been previously disclosed in the notice of federal tax lien filed in Santa Clara County, in the first, valid levy, and in the bankruptcy schedules filed in the Bankruptcy Court--thereby removing it from the general prohibition against disclosure contained in § 6103.[4]

I. THE SUBJECT LEVIES VIOLATE 26 U.S.C. §

---

separate remedy for injury incurred for a willful violation of the automatic stay provisions. See 11 U.S.C. § 362(h).

[4] The government's answer asserts as an affirmative defense that 26 U.S.C. § 7433 provides the exclusive remedy available for collection actions taken by the IRS. Plaintiff devotes 8 pages of his opening brief to rebutting this argument. The government, however, is not moving for summary judgment nor opposing plaintiff's motion on that ground. Defendant's opposition at 4 n. 1 ("Opposition Brief").

6103

Section 6103(a) sets forth the general rule that tax returns and tax return information are confidential and may not be disclosed by officers and employees of the United States, or by certain other persons with access to that information, "except as authorized by this title". There are several specific exceptions to the general rule of confidentiality. See 26 U.S.C. §§ 6103(c)-(o). As pertinent here, § 6103(k)(6) provides:

> An internal revenue officer . . . may, in connection with his official duties relating to . . . collection activity, . . . disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise available . . . with respect to enforcement of any other provision of this title. Such disclosures Shall be made only in such situations and under such conditions as the Secretary may

prescribe by regulation.

The Secretary has promulgated Regulations prescribing the circumstances in which disclosure may be made pursuant to § 6103(k)(6). Treasury Regulation §301.6103(k)(6)-1(a) permits disclosure "where necessary in order to property accomplish any activity described in [§ 6103(b)(6)]". The Regulation then states that disclosure is permitted only "if such activities cannot otherwise properly be accomplished without making such disclosure".

Treasury Regulation §301.6103(k)(6)-1(b)(6) permits disclosure in order "to apply the provisions of the Code relating to . . . levy on, or seizure . . . of, the assets to satisfy any such liability . . .". Disclosure is likewise only to be made if the levy "cannot otherwise by property accomplished . . .".

Plaintiff contends that the three levies at issue were not "proper" because two of the levies were issued in violation of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. §362 and one levy was issued after the Bankruptcy Court entered judgment that plaintiff's 1980 income tax liability was a dischargeable debt. Defendant, citing Flippo v. United States, 670 F. Supp. 638 (W.D.N.C. 1987), aff'd per curiam, 849 F.2d 604 (4th Cir. 1988), counters that whether a disclosure id authorized under § 6103 is in no way premised upon the validity of the underlying levy. Defendant further argues that it did not disclose any confidential information, because all of the information had already been disclosed in a public forum.

A. Levies Issued In Violation of the Automatic Stay Provisions of the Bankruptcy Code

It is undisputed that the second and third levies (issued November 20, 1988 and December 11, 1988) were issued in violation of Bankruptcy Code §362(a)(6).[5] The question, then, is whether issuance of the two levies in violation of the automatic stay provision of the Bankruptcy Code was per se a violation of the anti-disclosure provision of § 6103.

Plaintiff argues that notices of levy which are not properly issued may be grounds for liability under § 7431, citing Rorex v. Traynor, 771 F2d 383 (8th Cir. 1985) and Schrambling v. United States, 689 F. Supp. 1001 (N.D,. Cal. 1988) appeal docketed, No. 882495 (9th Cir. April 6,

---

[5] Bankruptcy Code § 362(a)(6) states that, in certain circumstances, a bankruptcy petition operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title".

1988). Section 6103 and the accompanying regulations permit disclosure where "necessary in order to property accomplish" certain tasks. In Rorex, the court relied on this language to hold that where a levy is improper, there is a wrongful disclosure under § 6103 as a matter of law. The levies in Rorex and in Schrambling were improper because they did not comply with Internal Revenue Code provisions. In the instant case, the levies were in accord with the applicable Internal Revenue Code provisions, but, plaintiff submits, improper when the bankruptcy stay is taken into account.

Plaintiff argues that the purpose of a levy is to collect delinquent taxes, 26 U.S.C. §6331, but where, as here, such collection is prohibited because of the automatic stay, the levy is not necessary to that purpose. Plaintiff states that

because the underlying necessity had been removed, the levies must be found to be unauthorized, and therefore in violation of § 6103. Plaintiff's Memorandum in Support of Summary Judgment at 11 ("Opening Brief").

Section 6103(k)(6) and the accompanying Regulations specifically authorize IRS employees, in connection with their official duties, to disclose tax return information to the extent necessary to effect a levy. Flippo, 670 F. Supp. 638; Barrett v. United States, 795 F.2d 446, 449-51 (5th Cir. 1986). Defendant's main premise is that whether a disclosure is authorized under §6103 is in no way premised upon the validity of the underlying levy. Flippo, 670 F. Supp. at 743; Timmerman v. Swenson, 44 A.F.T.R.2nd 79-5727 (D. Minn. 1979); see also Traxler v. United States, No. CV-F-87-725 REC,

slip op. (E.D. Cal. Nov. 28,. 1988) (dismissing a §7431 unauthorized disclosure action upon finding that the levies were authorized, albeit based upon assessments generated by computer errors). In Traxler, the court held that since the levies represented a proper collection method, they were therefore authorized, and the resultant disclosures made to effect those levies were authorized within the meaning of § 6103. "Liability is not imposed [under §7431] for erroneous disclosure, but only for disclosure which is unauthorized." Slip op. at 12.

In Rorex, the case primarily relied on by plaintiff, the court held that where a levy is improper, there is a wrongful disclosure under § 6103 as a matter of law. Rorex, 771 F.2d at 386. Defendant opines that Rorex was incorrectly decided, and that this Court should not follow it.

Defendant states that if wrongful disclosure damage actions could be brought by taxpayers under § 7431 whenever a lien or levy is determined to be defective, a flood of previously prohibited litigation could result, an indirect means for taxpayers to challenge levies would be established, and the speedy collection of taxes would be unduly hampered. See Opposition Brief at 13-16. More persuasively, defendant argues that the Congressional intent in enacting § 6103(k)(6) which authorizes the disclosure of tax return information to the extent necessary to perform certain official tax administration functions, was to permit disclosures necessarily related to such functions, and not to allow a collateral inquiry into the question of whether the official duties themselves were necessary and proper. Barrett v. United States, 795

F.2d 446, 451 (5th Cir. 1986).

Whether a levy issued in violation of the Bankruptcy Code also violates § 6103 is a novel question. The Court acknowledges that there is authority on both sides as to whether a levy issued in violation of the Internal Revenue Code violates § 6103. On balance, however, the Court finds that since there is no necessity or authority to issue an invalid levy, disclosure of information in an invalid levy constitutes violation of § 6103.

B. Levy Issued After Discharge

The Bankruptcy Court entered judgment on March 27, 1989 holding that plaintiff's 1980 tax liability was a dischargeable debt. Yet on May 28, 1989, the IRS issued another levy to plaintiff's bank concerning the very taxes which were discharged. Plaintiff strenuously argues

that a levy is not necessary after the liability has been discharged since there is no tax remaining to be collected. 26 U.S.C. § 6331(a). The IRS was informed on at least three occasions of plaintiff's bankruptcy petition and of the debt discharge. Plaintiff submits that the post-discharge levy was unlawful under § 6331 (taxpayer not liable to pay any tax if discharged), and therefore illegally disclosed tax return information of plaintiff, in violation of § 6103. It is this type of situation--violation of the Internal Revenue Code--to which Rorex squarely applies.[6]

---

[6] Once plaintiff establishes that the three levies constituted unauthorized disclosures which violated § 6103, plaintiff must also show that such wrongful disclosures were made "knowingly, or by reason of negligence". § 7431(a). Plaintiff has presented uncontroverted evidence that the IRS knew both of the bankruptcy petition and of the discharge issued by the Bankruptcy Court. The IRS

Defendant merely concludes that "this levy is likewise not actionable because it only disclosed information necessary to effect the levy, and because the tax information was not confidential". Opposition Brief at 22. Defendant's first argument--that the disclosed information was necessary to effect he levy--fails, since the Court finds that the validity of the disclosure is based on the validity of the underlying levy. Since the post-discharge levy was issued in violation of the Internal Revenue Code, the disclosure

---

has certain procedures whereby it enters such information into its computer system. Either the information was never entered, was incorrectly entered, or was not noticed by the officer who issued the levies The government does not seriously argue that it was not negligent and admits that this is truly a case of the IRS';s "left hand not knowing what its right hand is doing". In any event, plaintiff's evidence is uncontroverted, and the Court finds that the disclosures occurred "knowingly, or by reason of negligence".

violated § 6103. Defendant's second argument--that the tax information was not confidential when released by the IRS--is considered below.

II. THE SUBJECT LEVIES DISCLOSED CONFIDENTIAL TAX INFORMATION

A. Introduction

Defendant contends that the three subject levies did not violate § 6103: the levies did not disclose any confidential tax information since the information was already in the public record. Specifically, in July 1984, the IRS properly recorded a notice of federal tax lien for the 1980 tax year in the Santa Clara County Recorder's office, and republicized this tax information when it issued a proper wage levy to plaintiff's employer on September 27, 1988. Defendant contends that plaintiff himself made his 1980 tax information public when he filed

a bankruptcy proceeding and when he filed the complaint in this action.[7]

Section 6103(a) provides that returns and return information shall be confidential and shall not be disclosed except as authorized by the Internal Revenue Code. Section 6103(b)(8) proves that "[t]he term 'disclosure' means the making known to any person in any manner whatever a return or return information". It is defendant's contention that once information has been disclosed in a public forum--the filing of a tax lien with the county recorder or of a petition with the bankruptcy court--the filing effectively removes any reasonable expectation of

---

[7] The Court lends no credence to defendant's assertion that by filing a complaint in the instant action, plaintiff made his tax information public and thereby forfeited his right to bring the instant action.

privacy that the taxpayer has in such information. Opposition Brief at 17.[8]

The government contends that since plaintiff's 1980 tax liability had been a matter of public record for more than four years prior to the time that IRS issued the November and December 1988 levies, there could be no disclosure of confidential tax and return information within the meaning of § 6103.

B. Information Already In The Public Record Be Wrongfully Disclosed In violation of §6103

It is well established that what transpires in open court is a matter of

---

[8] One line of authority finds that the propriety of the disclosure, rather than whether the confidentiality of the return information was lost by exposure in a previous court action, is the issue to be decided by the courts. Chandler v. United States, 687 F. Supp. 1515, 1520 (D. Utah 1988), aff'd, 887 F.2d 1397 (10th Cir. 1989); see also, Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Olsen v. Egger, 594 F. Supp. 644 (S.D.N.Y. 1984).

public record. Nixon v. Warner Communications, 435 U.S. 589, 597 (1978). The government argues that "[o]nce tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information". Lambert v. United States, 854 F.2d 335 (9th Cir. 1988), cert. denied, 109 S. Ct. 1931 (1989) (Congress sought to restrict only the disclosure of confidential tax return information); United Energy Corp. v. United States, 622 F.2d 43, 45 (N.D. Cal. 1985) (taxpayer lost entitlement to privacy when it made certain of its tax return information public). But see Husby v. United States, 673 F. Supp. 442, 444 (N.D. Cal. 1987) (rejecting public record argument because tax court petition merely placed plaintiff's liability in question, and did not comprise a disclosure of the

information contained in the levy). It follows, the government argues, that the return information on the notices of levy was not confidential within the meaning of § 6103(a) because it had been made a part of the public record through the filing of a proper notice of federal tax lien and through the filing of the bankruptcy petition, and therefore was not subject to disclosure proscription of § 6103(a). Cf. Schrambling v. United States, 689 F. Supp. 1001 (N.D. Cal. 1988), appeal docketed No. 88-2495 (9th Cir. April 6, 1988) (finding confidentiality attached to return information previously made a part of the public record through the filing of federal tax liens). The government submits that since the information had been lawfully disclosed, "§ 6103(a)'s directive to keep return information confidential is moot". Lampert, 854 F.2d

at 338.

Plaintiff counters that the government's reliance on Lampert for the proposition that once tax information has been disclosed it loses its confidentiality, is misplaced. The Lampert court held "that once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate [§ 6103]". Plaintiff argues that the government is stretching Lampert beyond its scope because it merely relates to press releases, issued by agencies other than the IRS, reporting judicial proceedings.

Section 6103 was not intended to prevent any risk of disclosure, only that attributable to filing with the IRS. Plaintiff admits that by disclosing his own tax information in his bankruptcy

proceeding, he took the risk that anyone could look at his bankruptcy file, obtain his tax data, and that would not be covered by § 6103. See Cooper v. I.R.S., 450 F. Supp. 752 (D.C.D.C. 1977) (formerly confidential document disclosed on the public record not protected by § 6103). Plaintiff states, however, that such risk is not the same as granting the IRS the right to disclose this information to others Cooper, 450 F. Supp. at 754 n. 4 (confidentiality in this case is limited to the concept that the IRS may not freely divulge this information). Plaintiff argues that prior judicial disclosure should not per se remove tax information in the hands of the IRS from the coverage of §6103, because to do so defeats the

purpose of the statute.[9]

Plaintiff contends that § 6103 constitutes a general prohibition against disclosure by the IRS, and that Lampert's holding that "once information is lawfully disclosed in court proceedings, § 6103's directive to keep return information confidential is moot", frustrates the purpose of the statute. See Stokwitz v. United States, 831 F.2d 893, 895 (9th Cir. 1987), cert. denied, 108 S. Ct. 1592

---

[9] In support of his position that information released by the IRS to courts remains confidential even after judicial disclosure, plaintiff urges the Court to consider 26 U.S.C. § 6103(p)(4). Subsection (p)(4), however, indicates that procedural and recordkeeping safeguards apply only when such records are released from the IRS to various federal agencies pursuant to other subsections of § 6103 listed within subsection (p)(4). The safeguards of subsection (p)(4) do not apply to a case when, as here, the IRS discloses the documents directly to the Court or to other agencies for the purposes of levying assets. See Cooper v. United States, 450 F. Supp. at 753 n.3.

(1988) (§ 6103(a) was enacted to protect taxpayers' private financial information contained within the files of the IRS from other governmental and private inquiries by establishing a general policy of nondisclosure). Plaintiff also states that the disclosing official must be able to demonstrate that he "saw or heard what transpired in the courtroom, Craig v. Harney, 331 U.S. 367, 374 (1947)", before he can rely on Lampert to excuse non-compliance with § 6103.

Finally, plaintiff contends that the fourth levy is on a different footing than the second and third levy, because it incorrectly stated that plaintiff was still indebted to the IRS, and demanded payment of a tax which was no longer due. By issuing the post-discharge levy, the IRS was, in effect, telling plaintiff's bank that plaintiff was not seeing to his

financial responsibilities.

In Lampert, the Ninth Circuit considered "whether press releases by government officials, relating to public judicial proceedings, constitute unauthorized disclosures of 'tax return information' in violation of 26 U.S.C. § 6103 (1982)". In that case, the U.S. Attorney's Office issued press releases announcing that certain taxpayers had been charged or pleaded guilty to tax evasion and other criminal tax charges. The court held that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate [§ 6103]". 854 F.2d at 338.

Lampert concerned a factual situation at odds with the instant case,. In Lampert, the U.S. Attorney's Office was found not to have disclosed confidential

tax return information when it issued press releases relating to charges and pleas in several criminal tax cases. It was a government official other than the IRS which broadcasted information made public in a criminal proceeding.

In the instant case, it was the IRS itself which disclosed the tax return information. While § 6103 may not constitute a "general prohibition against disclosure", Lampert, 854 F.2d at 338, there is no question that it constitutes a general prohibition against disclosure by the IRS, absent some exception to § 6103(a). In Lampert, the court struck the balance between the government's ability to publicize the prosecution of tax evaders and the individual's expectation of privacy in his tax return information. Here, since the underlying levies were invalid and served no purpose, the

government had no interest to balance against Mr. Allen's expectation of privacy in his tax return information.

III. ATTORNEYS' FEES

Plaintiff seeks the minimum statutory damages of $3,000 ($1,000 per disclosure, in accordance with § 7431(c)(1)(A)), and recovery of his costs and attorney's fees, in accordance with § 7431(c)(2). Plaintiff is entitled to damages of $3,000, 41,000 for each act of unauthorized disclosure of his tax information by the IRS.

Section 7430 of the Internal Revenue Code, 26 U.S.C. § 7430, governs the awarding of costs and fees to litigants in tax cases. According to § 7430(a), the prevailing party in a civil tax suit brought in the United States Court by or against the United States may be awarded reasonable attorneys' fees and costs. See

Huckaby v. United States, 804, F.2d 297, 298 (5th Cir. 1986) (litigation costs include reasonable attorneys' fees). There is no question but that § 7430 applies to the instant case. The more difficult question is whether Mr. Allen qualifies as a "prevailing party".

In order to be considered a "prevailing party", the party must establish both that (1) the position of the United States in the civil proceeding was unreasonable, and (2) he has substantially prevailed with respect to the amount in controversy or the most significant issue or issues. § 7430(c)(2)(A). Mr. Allen has undoubtedly met the second prong of the "prevailing party" requirement since the government is held liable for disclosing confidential tax return information.

Plaintiff must also snow that the

position of the government was "unreasonable". The fact that the government lost this case cannot be dispositive of reasonableness, otherwise the "unreasonable position" limitation would be meaningless. Huckaby, 804 F.2d at 299. In the government's favor, this case is one that presents novel issues and involves close calls in resolving issues of law. On the other hand, however, the government clearly violated federal statutes and its own regulations by issuing the three invalid levies. On balance, this Court cannot conclude that the government's position was "unreasonable". See Scrambling v. United States, 689 F. Supp. at 1008-09 (government's position not unreasonable). The government's position was well-briefed and well-argued, and followed a line of reasoning that has been put forward by

other courts in similar cases.

Although the Court cannot find the government's position unreasonable and thus cannot award plaintiff reasonable attorneys' fees and costs, the Court does not wish to suggest that it condones the IRS's disclosure of Mr. Allen's confidential tax information and its disregard for the non-disclosure law. Indeed, the Court has found the IRS's conduct culpable and in violation of § 6103, and has held that Mr. Allen is entitled to statutory damages of $3,000 pursuant to § 7431.

CONCLUSION

Authority is split as to (1) whether tax return information disclosed in invalid levies is actionable under § 6103, and (2) whether tax return information may be found to be "confidential" within the meaning of § 6103 even if previously made

public in judicial or administrative proceedings. It is consistent with the intent of the statute to find that the validity of the underlying levy impacts on whether or not tax information is wrongly disclosed. Although it is a close question as to whether Mr. Allen's tax return information was confidential at the time the levies were issued, applying Lampert to the facts of this case would lead to a result contrary to the intent of the statute-to curtail abuse by government agencies of information filed with the IRS.

For the foregoing reasons, the Court finds that the three subject levies were issued in violation of § 6103, and that plaintiff is entitled to $3,000 statutory damages in accordance with § 7431(c)(1)(A). Because the government's position was not unreasonable, plaintiff

is not entitled to costs and attorneys' fees. § 7430(c)(2)(A).

Summary judgment is HEREBY GRANTED in favor of plaintiffs and against defendant.

IT IS SO ORDERED.

Dated: January 3, 1990.

/s/ Patricia V. Trumbull
PATRICIA V. TRUMBULL
United States Magistrate

No. 91-694

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

JONATHAN S. COHEN
TERESA E. MCLAUGHLIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether issuance of a procedurally-defective notice of tax levy that contains "return information" violates Section 6103 of the Internal Revenue Code, 26 U.S.C. 6103, if the "return information" has already properly been made a matter of public record.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bluxome Street Assoc. v. *Firemen's Fund Ins. Co.*, 206 Cal. App. 3d 1149, 254 Cal. Rptr. 198 (1988)	9
Chandler v. *United States:*	
887 F.2d 1397 (10th Cir. 1989)	7, 13, 14
687 F. Supp. 1515 (D. Utah 1988)	13
Christensen v. *United States*, 733 F. Supp. 844 (D.N.J. 1990), aff'd, 925 F.2d 416 (3d Cir. 1991)	10
Church of Scientology v. *IRS*, 484 U.S. 9 (1987)	8
Cooper v. *IRS*, 450 F. Supp. 752 (D.D.C. 1977)	15
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	15
Flippo v. *United States*, 670 F. Supp. 638 (W.D. N.C. 1987), aff'd, 849 F.2d 604 (4th Cir. 1988)	10
Husby v. *United States*, 672 F. Supp. 442 (N.D. Cal. 1987)	10
Johnson v. *Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986)	16
Lampert v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989)	7, 10
Malis v. *United States*, 87-1 U.S. Tax Cas. (CCH) ¶ 9212 (C.D. Cal. 1986)	16
Rodgers v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983)	7, 11, 12, 16
Rorex v. *Traynor*, 771 F.2d 383 (8th Cir. 1985)	10
Rueckert v. *IRS*, 775 F.2d 208 (7th Cir. 1985)	8
Stokwitz v. *United States*, 831 F.2d 893 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988)	8

Cases—Continued: Page

Thomas v. *United States*, 890 F.2d 18 (7th Cir. 1989) 14
Traxler v. *United States*, 88-2 U.S. Tax Cas. (CCH) ¶ 9627 (E.D. Cal. 1988) 10
United Energy Corp. v. *United States*, 622 F. Supp. 43 (N.D. Cal. 1985) 15
United States v. *Bacheler*, 611 F.2d 443 (3d Cir. 1979) 8
United States v. *MacKay*, 608 F.2d 830 (10th Cir. 1979) 12
United States v. *Posner*, 594 F. Supp. 930 (S.D. Fla. 1984) 15
United States Department of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) 14, 15

Statutes and regulations:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 362(a)(6) 5
11 U.S.C. 524 6
Internal Revenue Code (26 U.S.C.):
§ 6103 ..... 2, 4, 5, 6, 7, 8, 9, 11
§ 6103(b)-(q) 8
§ 6103(k)(5) 9
§ 6103(k)(6) 6, 9, 10
§ 6103(q) 9
§ 6331(a) 3
§ 6331(d) (1982) 3
§ 6331(d) 3, 4
§ 6702 13
§ 7431 ..... 2, 4, 5, 6, 12, 13, 14, 15
§ 7431(a)(1) 2
§ 7431(b) 2
§ 7431(c) 2
§ 7433 11
Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342:
§ 6236(a)(1), 102 Stat. 3737 3
§ 6236(h)(1), 102 Stat. 3740-3741 3
§ 6421(a), 102 Stat. 3747-3748 11

Statutes and regulations—Continued: Page

Cal. Gov't Code § 6253 (West Supp. 1990) 9
26 C.F.R.:
Section 301.6103(k)(6)-1(a) 9
Section 301.6103(k)(6)-1(b)(6) 9

Miscellaneous:

122 Cong. Rec. 24012-24013 (1976) 8
2 H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. (1988) 11
S. Rep. No. 938, 94th Cong., 2d Sess. (1976) 8
Webster's Third New International Dictionary (1986) 11

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-694

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported as 937 F.2d 1485. The opinion of the district court in *Schrambling* v. *United States* (Pet. App. 2b-26b) is reported as 689 F. Supp. 1001. The opinion of the district court in *Allen* v. *United States* (Pet. App. 1c-35c) is unreported.

JURISDICTION

The judgment of the court of appeals was entered July 5, 1991. The petition for a writ of certiorari was filed on October 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two separate civil actions commenced against the United States. In both suits, petitioners claimed that information contained in procedurally-defective notices of tax levy issued by the Internal Revenue Service was confidential "return information" under Section 6103 of the Internal Revenue Code, 26 U.S.C. 6103. They asserted that the United States is therefore liable in damages for the improper disclosure of this information under Section 7431 of the Code, which authorizes suits against the United States "[i]f any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information * * * in violation of any provision of Section 6103" (26 U.S.C. 7431(a)(1)).[1] In both suits, the information allegedly "disclose[d]" in the defective tax levies had previously been fully set forth in lawful, properly recorded public notices of federal tax liens.

1. a. Petitioner William E. Schrambling Accountancy Corporation (Schrambling) was delinquent in paying federal employment taxes and in filing corporate income tax returns in 1979. Lawful and proper notices of federal tax lien were recorded against Schrambling with the San Francisco County Recorder on four dates in 1982 and 1984, disclosing the name of the corporation, the taxes and tax periods involved, the dates of assessment, the corporation's

---

[1] Section 7431(b) further provides that there shall be no liability in the case of a "disclosure which results from a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b). Section 7431(c) authorizes a damage recovery of costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure. 26 U.S.C. 7431(c).

tax identification number, the unpaid balance of the assessments, and stating that the corporation had negleced to pay the tax after notice and demand (Pet. App. 4a-5a).

In 1984, Cheryl Matthews, a Revenue Officer employed by the Internal Revenue Service (IRS), was assigned to collect the corporation's delinquent taxes and to obtain delinquent tax returns. In June 1984, Matthews delivered to Schrambling a Final Notice and Demand pursuant to Section 6331(d) covering delinquent employment taxes for six quarters in 1981 and 1982 (Pet. App. 4a).[2]

In October 1984, the Schrambling case was reassigned to Revenue Officer Charles Stegner. Stegner obtained an update on the corporation's tax liabilities and identified assessments for employment taxes for additional tax periods. Notices of federal tax lien had been duly recorded respecting these additional employment tax liabilities, but notice of intent to levy to satisfy those liabilities had not been served upon the corporation in accordance with Section 6331(d). See note 2, *supra*. Stegner overlooked this fact in issuing three series of notices of levy. On October 9, 1984, he mailed 16 notices of levy to banks to collect

---

[2] Section 6331(a) of the Code authorizes the collection of tax by levy "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand." 26 U.S.C. 6331(a). Under Section 6331(d) as in effect at the time of the levies here in issue, a levy could be made "only after the Secretary has notified such person in writing of his intent to make such levy * * * no less than 10 days before the day of the levy." Effective with respect to levies made after July 1, 1989, however, the waiting period under Section 6331(d) has been extended from 10 to 30 days after a notice of intent to levy has been issued. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6236(a)(1) and (h)(1), 102 Stat. 3737, 3740-3741.

the taxes due for the additional periods, as well as those listed in the notice of intent to levy served in June 1984. On November 6, 1984, Stegner mailed notices of levy for the same tax periods to the 22 clients who were shown to owe the largest amounts to Schrambling and Chu, a partnership of which the corporation was a partner. On November 20 and 21, 1984, he mailed notices of levy for the same periods to the remaining 55 clients of the partnership. The notices of levy issued by Stegner did not comport with Section 6331(d) in that they sought to collect taxes for tax periods not listed in the notice of intent to levy that had been served by Matthews in June 1984 (Pet. App. 4a). The return information set forth in the notices of levy, however, had previously been properly disclosed in the recorded notices of tax lien (*id.* at 5a).

b. On November 19, 1986, Schrambling filed a complaint for damages under Section 7431 of the Code against the United States in the United States District Court for the Northern District of California.[3] Schrambling asserted that the issuance of the November notices of levy resulted in the disclosure of confidential return information in violation of Section 6103 because the IRS had not previously served notices of intent to levy for *all* tax periods encompassed by the notices of levy, as required by Section 6331(d). Schrambling sought compensatory damages in the amount of $847,000 and punitive damages in like amount (Pet. App. 5a).

The government contended that the notices of levy did not violate Section 6103 because the information contained in the notices was no longer confidential,

---

[3] Stegner was initially named as a defendant but was thereafter voluntarily dismissed (Pet. App. 5a).

having already been publicized in the lawful and proper notices of federal tax lien recorded in the San Francisco County Recorder's office. Following a bench trial, however, the district court held that, while Schrambling's claims based on the notices of levy sent on November 6, 1984, were barred by the two-year statute of limitations set forth in Section 7431 (Pet. App. 15b-16b), the disclosure of tax return information in the remaining 55 notices of levy violated Section 6103 of the Code (Pet. App. 19b-20b). The district court therefore found the government liable for $55,000 in damages under Section 7431 (Pet. App. 26b).

2. a. Petitioner Harold Allen owed federal income tax for 1980. A valid assessment for these taxes was made in March 1984. A valid notice of federal tax lien for this assessed liability was recorded in the Santa Clara County Recorder's Office in July 1984. The notice of lien set forth Allen's name, address, social security number, the tax period in question, the type of tax involved, the date of assessments, the unpaid balance of assessments, and stated that Allen had neglected to pay the tax after notice and demand. A notice of wage levy was issued to Allen's employer for the 1980 taxes on September 27, 1988. It is undisputed that this notice of levy was proper (Pet. App. 6a).

On November 3, 1988, Allen filed a petition under Chapter 7 of the Bankruptcy Code, listing the 1980 taxes as a liability. Under the automatic stay provision (11 U.S.C. 362(a)(6)), the government was then barred from pursuing collection against Allen for any claim that arose prior to the bankruptcy filing. On November 9, 1988, the government released the wage levy of September 27. On November 20, 1988, however, the IRS issued a second notice of

wage levy for the 1980 assessment, which it released on December 20, 1988. A third notice of levy was issued on December 11, 1988, to Allen's bank (Pet. App. 6a). In March 1989, Allen and the government filed a stipulation in Allen's bankruptcy case that the 1980 assessment was dischargeable (*ibid.*).

b. On April 26, 1989, Allen brought suit in the United States District Court for the Northern District of California seeking damages under Section 7431 of the Code, claiming that the second and third notices of levy were issued in contravention of the automatic stay under the Bankruptcy Code and were therefore improper disclosures of return information under Section 6103. Allen's attorney sent the government a letter advising of Allen's bankruptcy, and included the stipulation discharging his 1980 tax liability. On May 28, 1989, the government issued a fourth notice of levy to Allen's bank, and Allen amended his complaint to seek damages arising from that levy (Pet. App. 6a).

The district court granted summary judgment to Allen and awarded him $3,000 in damages. The court held that the second and third notices of levy had been issued in violation of the automatic stay and the fourth notice of levy violated 11 U.S.C. 524 because the 1980 tax liability had been discharged. Pet. App. 34c. Relying on provisions of Section 6103(k)(6) that authorize a disclosure of return information only when "necessary" to effect a levy, the court held that Allen was entitled to recover damages under Section 7431. The court reasoned that, "since there is no necessity or authority to issue an invalid levy, disclosure of information in an invalid levy constitutes [a] violation of § 6103" (Pet. App. 16c). The court acknowledged that the information in the last three notices of levy had previously been properly disclosed

on three separate occasions: (i) in the notice of lien filed in the public records of the Santa Clara County Recorder's Office; (ii) in the first validly-issued notice of levy; and (iii) by Allen himself in his bankruptcy petition. The court held, however, that the prior publication of this return information did not destroy its confidential nature (*id.* at 19c-30c).

3. The court of appeals reversed the judgment of the district court in both cases. Relying on its earlier decision in *Lampert* v. *United States*, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989), the court held that "[d]isclosure of return information that is not confidential does not violate Section 6103" (Pet. App. 7a). Because "[t]he recording of federal tax liens * * * and the filing of a bankruptcy petition places [the return] information * * * in the public domain" (*id.* at 11a), the "information * * * is no longer confidential [and] there can be no violation of Section 6103" (*ibid.*). Having disposed of the cases in this manner, the court found it unnecessary to reach the question "whether improperly issued levies, containing confidential tax return information, may constitute a violation of Section 6103" (*ibid.*).

ARGUMENT

The court of appeals correctly held that technically-defective notices of levy that contain "return information" do not violate Section 6103 of the Code when the same information has previously been disclosed in properly-filed federal tax liens. The decision in this case conflicts, however, with the Tenth Circuit's decisions in *Rodgers* v. *Hyatt*, 697 F.2d 899 (1983), and *Chandler* v. *United States*, 887 F.2d 1297 (1989).

Because this conflict of authority will place revenue officers under disparate obligations in different regions of the country, and because the question presented in this case is one of considerable importance to the administration of the tax laws, we do not oppose the granting of certiorari in this case.

1. Section 6103 of the Code "lays down a general rule that 'returns' and 'return information' as defined therein shall be confidential" (*Church of Scientology* v. *IRS*, 484 U.S. 9, 10 (1987)). The statute was enacted in response to revelations that tax return information had been used for political purposes during the Watergate era. See S. Rep. No. 938, 94th Cong., 2d Sess. 317-318 (1976); 122 Cong. Rec. 24,012-24,013 (1976) (Sen. Dole); *Reuckert* v. *IRS*, 775 F.2d 208, 210 (7th Cir. 1985). Congress recognized, however, that there is often a legitimate need for the disclosure of returns and return information. The statute therefore contains several provisions authorizing the IRS to disclose return information for tax administration and collection purposes and for other governmental agencies to use for statistical or law enforcement purposes. See 26 U.S.C. 6103(b)-(q). The provisions authorizing disclosure were intended to strike a balance between "the right of taxpayers to the privacy of tax information in the hands of the IRS and the legitimate needs of others for access to that information" (*Stokwitz* v. *United States*, 831 F.2d 893 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); see *United States* v. *Bacheler*, 611 F.2d 443, 446 (3d Cir. 1979)).

Although Congress placed restrictions upon the disclosure of return information, it was careful to preserve the government's ability to use such information for the primary purpose for which it is col-

lected—administering the tax laws. The disclosure of return information "in connection with * * * any * * * collection activity" is specifically authorized by Section 6103(k)(6) "to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to * * * liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title." 26 U.S.C. 6103(k)(6). Regulations issued under Section 6103(q) to implement Section 6103(k)(6) authorize the disclosure of return information and taxpayer identity information when necessary to establish liens against a taxpayer's assets or to effect levies. 26 C.F.R. 301.6103(k)(6)-1(a) and (b)(6).

The court of appeals correctly held that the return information contained in the defective notices of levy did not violate Section 6103 because that same information had previously been properly disclosed in the publicly recorded notices of federal tax lien. Documents filed in the office of county recorder in California are public records open for public inspection at all times (Cal. Gov't Code § 6253 (West Supp. 1990)), and the act of recording "provides constructive notice of the contents of the documents creating the [lien]" (*Bluxome Street Assoc.* v. *Firemen's Fund Ins. Co.*, 206 Cal. App. 3d 1149, 1158, 254 Cal. Rptr. 198, 204 (1988)). Once information properly has been made part of the public domain—as when a notice of tax lien has been recorded with the county clerk—that information can no longer be regarded "confidential" within the meaning of Section 6103. The republication of information that is no longer "confidential" is not a violation of Section

6103. See *Lampert* v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989).[4]

Lampert v. *United States* involved various press releases issued by a U.S. Attorney that summarized tax evasion charges, convictions and sentences and announced the commencement of an action seeking a permanent injunction against a taxpayer's promotion and sale of abusive tax shelters. The subjects of the press releases sued for wrongful disclosure of return information. The court of appeals held that the

---

[4] Having found that the information disclosed in the notices of levy was no longer confidential, the court of appeals did not find it necessary to address the government's alternative argument that the disclosures were authorized under Section 6103(k)(6), which permits the disclosure of return information in connection with collection activity when disclosure is necessary for enforcement of any Code provision. Several courts have held that a disclosure of information in connection with collection activity is authorized even if the underlying levy is technically invalid. *E.g.*, *Flippo* v. *United States*, 670 F. Supp. 638 (W.D.N.C. 1987), aff'd without published opinion, 849 F.2d 604 (4th Cir. 1988); *Christensen* v. *United States*, 733 F. Supp. 844, 854 (D.N.J. 1990), aff'd without published opinion, 925 F.2d 416 (3d Cir. 1991); *Traxler* v. *United States*, 88-2 U.S. Tax Cas. (CCH) ¶ 9627 (E.D. Cal. 1988). Other courts, however, have concluded that a disclosure of return information is not authorized when the collection action which results in the disclosure is defective, either because there is no underlying tax liability or because procedural statutory prerequisites to the collection activity have not been satisfied. *E.g.*, *Rorex* v. *Traynor*, 771 F.2d 383, 386 (8th Cir. 1985); *Husby* v. *United States*, 672 F. Supp. 442, 444-445 (N.D. Cal. 1987). To the extent that those cases hold that a disclosure of return information is not authorized when the collection action that results in the disclosure is defective, we believe that they were wrongly decided; the proper inquiry under Section 6103(k)(6) is whether the disclosures made were necessary to effect collection activity, not the collateral question whether the collection activity was

republication of information already disclosed in public proceedings does not violate Section 6103. The court reasoned that "[o]nce tax return information is made a part of the public domain," it is no longer "confidential" within the meaning of Section 6103 (*id.* at 338).[5] As the court of appeals observed in the present case, the public recording of tax liens "exposes the information to as much, if not greater, publicity than publication in a judicial proceeding" (Pet. App. 9a-10a).

2. Although the decision in this case is correct, we agree with petitioners (Pet. 7) that it is in conflict with the Tenth Circuit's decision in *Rodgers* v. *Hyatt*, 697 F.2d at 904. In *Rodgers*, the initial disclosure of return information occurred at a summons enforcement hearing. Hyatt, an IRS agent, testified at the hearing that there had been allegations that Rodgers was trafficking in stolen oil and had not reported all his income from his oil sales. The summons was ordered enforced. Rodgers appealed to the

---

performed in accordance with applicable Code procedures. The "exclusive remedy for recovering damages" for unauthorized collection activities (see 2 H.H. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 228-229 (1988)) is an action for damages under Section 7433 of the Code, enacted as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6241(a), 102 Stat. 3747-3748, which permits recovery if an IRS employee "recklessly or intentionally" disregards any provision of the Code or regulations in connection with collection activity occurring after November 10, 1988. See 26 U.S.C. 7433.

[5] This, of course, accords with the normal meaning of the term "confidential," which includes communications "known only to a limited few: not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Congress presumably was aware of this common meaning of the term "confidential" in selecting it for use in Section 6103.

Tenth Circuit, which affirmed in an opinion that repeated these same allegations concerning Rodgers (*United States* v. *MacKay*, 608 F.2d 830, 832 (1979)). At a subsequent meeting with representatives of another taxpayer, Hyatt made reference to the allegations that Rodgers was dealing in stolen oil. Rodgers then brought a damages action against Hyatt under the pre-1982 predecessor of Section 7431. A jury gave Rodgers the minimum award of $1,000, and the government appealed.

The court of appeals affirmed. In reaching its conclusion, the court did not directly address the threshold question whether there could be a wrongful disclosure of return information that had previously been disclosed in open court. Instead, the court stated that it "need not reach the loss of confidentiality contention advanced by Hyatt" because his disclosures "were violative of the provisions of § 6103 (k)(6)" (697 F.2d at 904). If this statement in the court's opinion were read broadly—to suggest that return information can *never* lose its confidential status, even after it has been made public—it obviously would have been in conflict with the rationale of the Ninth Circuit in *Lampert*. At the time the Ninth Circuit issued its opinion in *Lampert*, however, we believed that the Tenth Circuit might confine its holding in *Rodgers* to situations where the disclosure of return information was found to be "abusive" (697 F.2d at 906). As matters then stood, it was not certain that the Tenth Circuit would find a wrongful disclosure in circumstances similar to those of the *Lampert* case, where the press releases served the legitimate interest of publicizing the government's enforcement efforts. For that reason, we opposed the petition for certiorari filed in *Lampert*, in which the

petitioners asserted a conflict with *Rodgers* v. *Hyatt* (see 88-1200 Br. in Opp. at 9-10).

It has since became apparent, however, that the Tenth Circuit does not read *Rodgers* narrowly. In *Chandler* v. *United States*, 887 F.2d 1397 (1989), issued six months after we filed our opposition in *Lampert*, the Tenth Circuit affirmed an award of damages under Section 7431 based solely upon a clerical mistake that led to the disclosure in a tax levy of information that the *taxpayers themselves* already had disclosed in an unsuccessful suit to enjoin collection of the taxes they owed.[6] See 887 F.2d at 1398.

---

[6] In *Chandler*, a frivolous return penalty was assessed against the taxpayers under Section 6702 for striking out the jurat on their tax return. The IRS sent the taxpayers a notice and demand for payment, with an accompanying form that called for them to write their social security numbers on their check. The Chandlers brought suit to enjoin the IRS from collecting the penalty plus interest, and that suit was ultimately dismissed. See 687 F. Supp. 1515, 1516 (D. Utah 1988). While that suit was pending, they paid $512.60 by check, but they did not write their social security numbers on the check, as requested. When the check reached the IRS, the person processing the payment inadvertently entered their street address number into the computer as the taxpayer's social security number. Because that clerical mistake yielded a response of no account under that number, the money was deposited into a suspense account. The taxpayers' liability therefore remained listed as unpaid and outstanding. In due course a revenue officer served a notice of levy for the $512.60, plus accrued interest, on Mrs. Chandler's employer. The Chandlers then brought a second suit to enjoin the collection of the money, and on further investigation the levy was released, except as to $14.64 in interest charges remaining unpaid. Although the Chandlers themselves had disclosed the pertinent information in their first suit before the notice of levy was issued, they brought a wrongful disclosure suit

The Tenth Circuit's opinion in *Chandler* makes it apparent that *Rodgers*, as applied by that court, conflicts with *Lampert* and with the decision in this case. See *Thomas* v. *United States*, 890 F.2d 18, 20 (7th Cir. 1989) (referring to "the conflict between the Ninth and Tenth Circuits over whether the disclosure of return information in a judicial record bars the taxpayer from complaining about any subsequent disclosure").[7] The conclusion in this case that, once return information is publicized, further disclosure is not actionable (Pet. App. 11a) conflicts with the Tenth Circuit's finding of liability under Section 7431 for disclosure of return information that has previously been made a matter of public record.

3. Petitioner errs in contending (Pet. 16) that the decision in this case conflicts with *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). The

---

under Section 7431, and prevailed. *Ibid.* They were awarded $1,000, and the Tenth Circuit sustained that award in a brief *per curiam* opinion citing *Rodgers* and affirming the judgment for "substantially the reasons stated by the district court" (887 F.2d at 1398).

[7] In *Thomas* v. *United States*, the Seventh Circuit held that the taxpayer was not entitled to an award of damages under Section 7431 when a Tax Court decision is publicized in an IRS press release. The court noted that it was not necessary to decide "whether the disclosure of the information by the Tax Court removed the protective cloak of section 7431 and allowed the Internal Revenue Service to * * * publicize so much of the information found [in Thomas's file] as had been disclosed in the opinion" (890 F.2d at 20-21), because the government was entitled to prevail there on the "narrower ground" (*id.* at 20) that "[t]he information disclosed in the press release did not come from Thomas's tax return" (*ibid.*) but, rather, from the Tax Court's opinion.

Reporters Committee decision concerns the scope of the protection afforded to private information contained in government records from disclosure under the Freedom of Information Act. The scope of protection afforded to *private* information under the FOIA has no bearing on the scope of protection afforded to *confidential* information under the Internal Revenue Code. Different statutes and different interests are involved in the two situations. See note 5, *supra*. The decision in *Reporters Committee* recognizes that a loss of confidentiality and a loss of privacy are far different concepts, for the Court emphasized in that case that information already contained in public records—that could not in any sense be said to be "confidential"—could nonetheless be "private" information in the sense that it was personal or embarrassing in content. See 489 U.S. at 769-771. See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 494-495 (1975). Nothing in *Reporters Committee* provides support for petitioners' oxymoronic conclusion that information in the public domain is "confidential" information.

4. The question presented in this case is of substantial administrative importance. As the numerous cases involving this issue reflect, whether a defective notice of levy containing return information that has previously properly been made public creates a claim for damages under Section 7431 is a question that frequently recurs.[8] Resolution of this conflict be-

---

[8] In addition to the cases previously cited in this brief, *United Energy Corp.* v. *United States*, 622 F. Supp. 43, 46 (N.D. Cal. 1985), *United States* v. *Posner*, 594 F. Supp. 930, 936 (S.D. Fla. 1984), and *Cooper* v. *IRS*, 450 F. Supp. 752 (D.D.C. 1977), all hold that there can be no actionable disclosure of return information that has been publicized in

tween the circuits is needed to avoid continuing uncertainty and uneven application of this statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

JONATHAN S. COHEN
TERESA E. MCLAUGHLIN
Attorneys

DECEMBER 1991

---

prior court proceedings. There are also, however, decisions to the contrary. See, *e.g.*, *Rodgers* v. *Hyatt*, *supra*; *Malis* v. *United States*, 87-1 U.S. Tax Cas. (CCH) ¶ 9212 (C.D. Cal. 1986); *Johnson* v. *Sawyer*, 640 F. Supp. 1126, 1132-1133 (S.D. Tex. 1986).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45214